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Supreme Court of the United States

No. 92

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner

versus

E. A. HILL,
Respondent

REPLY BRIEF OF PETITIONER

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Respondent in his brief has made only one principal point: That the application for writ of certiorari filed by petitioner is really a petition for rehearing. Nothing could be further from the truth.

The petitioner, it is true, has devoted a considerable portion of its argument to the meaning of the decision handed down by this Court on the first appeal, but it seems quite plain that this is necessary only to determine *what* was decided in that appeal and therefore *what* is the law of the case on this appeal.

Petitioner does not deny that the first decision of this Court is the law of the case. Petitioner's difficulty, and, as petitioner believes, the North Carolina Court's difficulty, arises out of the interpretation of the first decision of this Court. Petitioner is convinced that the first decision of this Court was directed to assumption of risk and to no other point. If it was, the decision, as the law of the case, would not affect this appeal. If the first decision was not directed to assumption of risk, but instead was a general holding that the evidence on the first trial was sufficient to take the case to the jury, then, and in that event only, it would be necessary for the Court now to reconsider its first decision in

order to pass upon this appeal. Respondent cites on Page 4 the opinion of Mr. Justice Reed in *Insurance Group Committee v. Denver and Rio Grande Western Railroad Company*, 329 U. S. 607, 91 L.Ed. 547, (1947). The quotation from the opinion indicates that the power rests in a Federal Court to change its position on a subsequent review in the same case where unusual circumstances would justify it. Where this Court may have decided a substantial question on assurances of the successful plaintiff that certain things were involved in the case, and it subsequently appears that those assurances were misleading, it would seem the circumstances are sufficiently unusual to justify the Court in changing its order or decision. However, it is not necessary in this case to reach that point, for if, as petitioner believes and respectfully argues, the first decision was based upon the plaintiff's misleading argument with respect to "assumption of risk" then that decision has no reference to the point involved in the present application for certiorari, and therefore cannot be the law of the case with respect to the sufficiency of the evidence at the trial below. Petitioner is not, as respondent claims, asking this Court to reverse itself; it is asking this Court to reverse the North Carolina Court.

Since this Court did not explain the reasons for its former holding, it was obviously necessary to analyze the argument of the successful party, respondent herein, in order to arrive at some conclusion about what the Court had actually decided. Respondent's former argument indicated the Court had decided that North Carolina applied the proscribed doctrine of assumption of risk. If this be true, that decision would not, as the law of the case, prevent this Court from now holding that there was not sufficient evidence of negligence to justify the submission of the case to the jury. Neither would it prevent the Court now from clarifying what it meant in its decision on the first appeal. Petitioner's analy-

sis of this Court's first opinion is made, not for the purpose of securing a reversal of that opinion, but merely for the purpose of ascertaining what is the law of the case on this application for certiorari, and what was the law of the case on the last appeal to the North Carolina Supreme Court. Respondent's label of "petition to rehear" which he applies so earnestly to petitioner's application for certiorari is not justified either by the argument which petitioner has made or by the facts or the history of the litigation.

Petitioner respectfully contends that this Court decided on the first appeal only that "assumption of risk" could not be applied against the respondent. Petitioner respectfully contends that the North Carolina Court has extended that holding to mean that the North Carolina Court could not now find an insufficiency of evidence in the respondent's case. The petitioner respectfully contends that the decision of this Court was not so broad, and that it did not prevent either in terms or as the law of the case, a nonsuit in the North Carolina trial court. Therefore, the North Carolina Court has misapplied the decision of this Court in the first appeal, and that is the entire burden of the petitioner's complaint herein. Again petitioner calls the Court's attention to the fact that the North Carolina Court did not say that the decision of this Court prevented a nonsuit, but indicated its own uncertainty by saying that the decision of this Court "must be *interpreted*" as a holding that the evidence was sufficient. There cannot be the slightest doubt that the first decision of this Court requires interpretation in order to arrive at an understanding of what is the law of the case. Because of this very necessary analysis and interpretation, the respondent has seen fit to denote the application for certiorari as a petition to rehear.

The respondent was successful on the first appeal by mislabeling the decision of the North Carolina Supreme Court.

He seeks now to be successful on this appeal by mislabeling the petitioner's application for certiorari. The one is as accurate as the other.

At Page 4 of respondent's brief in opposition to the petition for writ of certiorari he argues that the granting of the writ would bring chaos into the judicial system of the United States, and that a reversal of the North Carolina courts would create a considerable predicament for the judiciary of North Carolina. Quite the reverse is true. In *Hill v. Atlantic Coast Line R. Co.*, 229 N. C. 236, 49 S. E. (2d) 481 (1948), which was the first appeal to the North Carolina Supreme Court, that Court found that there was no sufficient evidence of negligence to justify the submission of respondent's case to the jury. This Court reversed in a per curiam decision without explanation. The North Carolina Court indicated its own confusion and uncertainty, when it found it necessary to pass upon this question, by saying that the decision of this Court "must be *interpreted*" to mean that there was sufficient evidence to go to the jury, *Hill v. Atlantic Coast Line R. Co.*, 231 N. C. 499, at Page 501, 57 S. E. (2d) 781 (1950). The North Carolina Court did not find that there was evidence of negligence sufficient to carry respondent to the jury. It found merely that this Court, for reasons unknown to the North Carolina Court, had so decided, although it was uncertain that it was a fact, since it found it necessary to *interpret* the decision of this Court even to reach that result. It seems quite likely that the North Carolina Court has already found considerable confusion in this litigation and that a clarification of this Court's former decision would create order, not disorder, and eliminate, not make confusion, even if that clarification resulted in affirmance of the judgment below. Petitioner respectfully submits that the order or decision or position of this Court ought to be clarified so that the courts below will know what

it was, and so that the courts below may apply it with certainty. There is no disorder to be created in the process.

At Page 5 of respondent's brief he states: "The petitioner requests in effect that this Court write an opinion that each of its nine members was 'mislead' into a misconception of the import of the record in a simple negligence action under F. E. L. A. by the shrewdness or adroitness or the skill of little country lawyers who at the time they filed Hill's petition in December, 1948 had not even been admitted to the Bar of this Court."

The petitioner does not ask this Court to write an opinion that each of its nine members was mislead. The petitioner is requesting this Court to decide that its first opinion is not the law of the case on *this* appeal, simply because the Court's former opinion turned on a point not involved in this appeal. Whether the Court was misled by respondent's former argument or not, if the former opinion went to assumption of risk only, the present application for certiorari should be granted.

Petitioner again respectfully contends that certiorari should be granted, and that this case should be heard upon its merits.

Respectfully submitted,

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